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HONEYWELL INTERNATIONAL INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEBORAH GETZ, et al.,

Plaintiffs,

V.

THE BOEING COMPANY, et al.,

Defendants.

Case No. CV 07-06396 CW

**DEFENDANT HONEYWELL
INTERNATIONAL INC.'S REPLY
IN SUPPORT OF MOTION TO
STAY DISCOVERY**

Date: June 19, 2008
Time: 2:00 p.m.
Courtroom: 2
Judge: Hon. Claudia Wilken

1 Defendant Honeywell International Inc. (“Honeywell”) hereby files this reply brief in
 2 support of its motion to stay discovery.

3 **I. INTRODUCTION**

4 Plaintiffs’ opposition focuses entirely on the merits of Honeywell’s 12(b)(1) motion to
 5 dismiss and fails to address the legal standard for the motion to stay discovery. Plaintiffs fail to
 6 identify any specific discovery that they need prior to the resolution of Honeywell’s motion to
 7 dismiss. In particular, plaintiffs make no attempt to argue that jurisdictional discovery is needed
 8 to resolve the motion to dismiss nor do they argue that the case schedule cannot accommodate a
 9 short stay in merits discovery. Plaintiffs also provide no analysis of the burden and expense of
 10 immediate discovery relative to the parties’ need for it. Rather, plaintiffs rely on general
 11 statements of law without explaining why expensive—and potentially moot—merits discovery is
 12 needed prior to the Court’s ruling on the jurisdictional motion to dismiss. By failing to specify
 13 any particular discovery that is needed or any reason that discovery must occur in advance of the
 14 Court’s jurisdictional ruling, plaintiffs implicitly admit that they will not be prejudiced by a short
 15 stay of discovery. Accordingly, Honeywell’s motion to stay discovery should be granted.

16 **II. THERE IS GOOD CAUSE TO STAY DISCOVERY WHILE THE MOTION
 17 TO DISMISS IS PENDING**

18 A stay of discovery is warranted because: (1) a delay in commencement of discovery until
 19 Honeywell’s motion to dismiss is decided will avoid unnecessary burden and expense; (2) the
 20 motion to dismiss has a high likelihood of success; and (3) the plaintiffs will not suffer any
 21 prejudice if the Court grants the stay. *See Spencer Trask Software & Info. Servs. v. RPost Int'l*,
 22 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (“Good cause may be shown where a party has filed a
 23 dispositive motion, the stay is for a short period of time, and the opposing party will not be
 24 prejudiced by the stay.”); *see also Little v. Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (affirming
 25 stay of discovery pending resolution of a threshold issue because such a stay “furthers the goal of
 26 efficiency for the court and litigants”). Good cause exists here, because Honeywell has filed a
 27 dispositive motion that has a high likelihood of success, the requested stay of discovery will last
 28 only until the motion to dismiss is decided, and plaintiffs will not be prejudiced by the stay.

1 Plaintiffs' opposition fails to identify the specific discovery they believe they need, let
 2 alone compare that need to the associated burden and expense. Plaintiffs also fail to explain how
 3 they would be prejudiced by the proposed stay. Instead, plaintiffs focus on the merits of
 4 Honeywell's motion to dismiss. (Plaintiffs' Opposition to Honeywell's Motion to Stay Discovery
 5 ("Pl. Opp.") at 2-4.)

6 The first element in the good cause analysis is whether a delay in the commencement of
 7 discovery, until the motion to dismiss is decided, will result in an avoidance of unnecessary
 8 burden and expense. Plaintiffs' failure to even address the burden/expense element makes clear
 9 that plaintiffs are not seeking specific discovery to resolve any factual issues raised in the Rule
 10 12(b)(1) motion, and that no discovery is needed to resolve the motion to dismiss.

11 The likelihood of success of the motion to dismiss is another element in the good cause
 12 analysis. As fully discussed in Honeywell's motion to dismiss and the reply papers thereto,
 13 plaintiffs are unable to defeat the fundamental jurisdictional problem presented by this lawsuit
 14 against government contractors arising out of active combat operations during a war. Such claims
 15 involve nonjusticiable issues that cannot be decided by this Court. The Court is simply not in a
 16 place to review and evaluate the causative factors that would flow from operational decisions in a
 17 mission to capture or kill someone in the al-Qaeda network.

18 Furthermore, plaintiffs fail to explain how they would be prejudiced by a stay of discovery
 19 while the jurisdictional motion is pending. Again, the fact that plaintiffs' opposition lacks any
 20 discussion of the prejudice they may face should lead the Court to grant the motion to stay. A
 21 stay of discovery is therefore proper under Ninth Circuit law. *See Jarvis v. Regan*, 833 F.2d 149,
 22 155 (9th Cir. 1987).

23 Although plaintiffs attempt to distinguish *Jarvis*, Honeywell does not dispute that on a
 24 motion challenging subject matter jurisdiction, a district court may consider evidence outside the
 25 pleadings. (Pl. Opp. at 3.) Indeed, Honeywell has submitted such evidence in conjunction with
 26 its motion to dismiss. Nowhere in their opposition, however, do plaintiffs state that there is
 27 specific additional evidence that plaintiffs need to discover prior to the resolution of the
 28 jurisdictional motion. In fact, Honeywell did not have access to the Army Investigation 15-6

1 report (Docket Entry No. 80 Ex. A) (“Army Report”) until it was attached to plaintiffs’ opposition
2 to its motion to dismiss. Thus, it would be error to deny the request for a stay of discovery. *See*
3 *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (affirming stay of discovery pending
4 resolution of 12(b) motion because “Rae has failed to point to any specific information obtainable
5 through discovery that would have enabled appellants to state a federal cause of action.”).

Plaintiffs' reliance on *Laub v. United States DOI*, 342 F.3d 1080 (9th Cir. 2003), is misplaced. In *Laub*, plaintiffs specifically requested discovery of "a detailed accounting of all transactions undertaken by the Defendants" to support their position on subject matter jurisdiction. *Id.* at 1093 (quotation marks omitted). In reversing the district court's denial of the discovery request, the Ninth Circuit found that the "additional discovery would be useful to establish federal subject matter jurisdiction." *Id.* Here, plaintiffs have not made a specific jurisdictional discovery request nor have they stated that additional discovery is needed to resolve the motion to dismiss.¹ Indeed, it is difficult to envision what discovery plaintiffs believe would be necessary during the pendency of Honeywell's motion. As plaintiffs indicated in their opposition to the motion to dismiss, the Army Report contains the "most concise statement of facts presently available" regarding the Accident. (Plaintiffs' Opposition to Motion to Dismiss at 3 n.2.) In any event, the fact that plaintiffs' opposition is devoid of any description of a specific need for discovery underscores the conclusion that a short stay of discovery will not prejudice plaintiffs.

20 None of plaintiffs' other cited cases alters this conclusion. Honeywell does not disagree
21 that jurisdictional discovery should be permitted where one party seeks specific information that
22 will aid in the resolution of a jurisdictional challenge. (Pl. Opp. at 3.) But that is not the case
23 here. Plaintiffs do not identify any specific discovery that they need prior to the resolution of
24 Honeywell's 12(b)(1) motion to dismiss, nor is any discovery needed. Accordingly, there is good
25 cause to stay expensive merits discovery while the motion to dismiss is pending.

¹ Despite the fact that plaintiffs have served requests for admission, the requests are unrelated to the political question doctrine that is the basis for Honeywell's motion to dismiss.

III. CONCLUSION

For the foregoing reasons, Honeywell's motion to stay discovery should be granted.

Dated: June 5, 2008

MORRISON & FOERSTER LLP

By: /s/ James W. Huston
James W. Huston

Attorneys for Defendant
HONEYWELL INTERNATIONAL INC.

CERTIFICATE OF SERVICE

I, James W. Huston, hereby certify that on June 5, 2008, I caused to be electronically filed a true and correct copy of the attached **DEFENDANT HONEYWELL INTERNATIONAL INC.'S REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY** with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record for Plaintiffs:

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I also served the following party by overnight mail [Fed. Rule Civ. Proc. rule 5(b)] by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows, for collection by UPS, at 12531 High Bluff Drive, Suite 100, San Diego, California, 92130-2040 in accordance with Morrison & Foerster LLP's ordinary business practices.

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